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No. 98-6

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, *et al.*,
Petitioners,
v.
LAURA NEZTSOSIE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Petitioners have sought a federal-court injunction to bar respondents' prosecution of tort claims against them in Navajo tribal court. Relying on the Price-Anderson Act, petitioners contend that they are not required to exhaust their jurisdictional objections in the tribal court under the principles set forth in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The Questions Presented with respect to exhaustion of remedies are as follows:

1. Whether the Price-Anderson Act contains an express prohibition on tribal-court jurisdiction over "public liability actions."

2. Whether the tort claims asserted by respondents—which are based on activities apparently outside the substantive scope of the Price-Anderson Act and of the Atomic Energy Act—"patently" fall within the category of "public liability actions."

Petitioners have also argued that the first of these issues is not properly before the Court. The Question Presented with respect to that argument is as follows:

3. Whether the court of appeals, having jurisdiction over petitioners' appeal of the orders against them, was absolutely barred from reviewing the preliminary injunctions against respondents, in the absence of a cross-appeal.

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BRIEF FOR RESPONDENTS

STATEMENT

The principles set forth by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), demand that petitioners establish two propositions in order to have a federal court bypass the usual exhaustion requirements and enjoin the previously filed actions in tribal court. First, they must establish that tribal courts have been expressly stripped of jurisdiction to adjudicate any "public liability action" under the Price-Anderson Act, 42 U.S.C. §§ 2014(hh), 2210(n)(2). Second, they must also establish that respondents' claims so patently fall into the category of covered "public liability action[s]" that exhaustion of that question in the tribal courts would be pointless.

Although petitioners seem to think otherwise, respondents do not dispute that, *if* their tribal-court claims are

properly deemed to be "public liability" claims, the claims cannot simultaneously survive as something else (say, tribal-law or state-law claims). Our position, instead, is that respondents' claims are not (and, certainly, are not clearly) within the scope of "public liability actions" and that, even if they were, Congress has not expressly barred tribal courts from exercising jurisdiction over them. The Ninth Circuit held that the tribal courts should first be allowed to address their own jurisdiction over "public liability actions," thus finding no immediate need to decide whether respondents' claims are properly deemed to be in that class. As we discuss, we think that both issues are properly left to the tribal courts in the first instance.

I. Statutory Framework

The relevant statutory provisions bearing on these issues differ in content and in complexity. With respect to whether tribal courts may hear "public liability actions," the statutory analysis is simple: the Act gives federal courts jurisdiction over such actions, and authorizes their removal from state courts, but does not expressly take away the authority of tribal courts—otherwise conceded to extend to suits involving activities on tribal land—to hear such actions. *See* Argument IV, *infra*. With respect to what claims fall within the intended scope of "public liability actions," the proper analysis depends on the broader context of the Price-Anderson Act as a whole and of the Atomic Energy Act of which it is a part. The critical facts, based on the record to date, are that the injury-causing actions and omissions at issue here were (a) not subject to the safety-regulation scheme of the Atomic Energy Act, which has not been read to cover the very first stage in the production of nuclear fuel, namely, uranium *mining*, and (b) not subject to any indemnification agreement under the Price-Anderson Act or, therefore, the Act's substantive provisions. The central statutory question, raising significant Article III issues, is whether Congress meant the jurisdiction-related "public liability action" standard to extend to a case where the defendants are not themselves

"liable for public liability" (42 U.S.C. § 2014(t)) and where the Atomic Energy Act's regulatory interest does not apply. *See* Argument II, *infra*.

A. *Jurisdiction Over Public Liability Actions*

The Price-Anderson Act provides for original federal jurisdiction, "without regard to the citizenship of any party or the amount in controversy," over a particular class of cases: "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210 (n)(2). First enacted in 1966, the provision originally conferred jurisdiction only over public liability actions "arising out of or resulting from an extraordinary nuclear occurrence." After the Nuclear Regulatory Commission had determined that the 1979 incident at Three Mile Island was not an "extraordinary nuclear occurrence," Congress amended the statute in 1988 to its current form.

Section 2210(n)(2), while conferring jurisdiction on federal district courts, does not confer exclusive jurisdiction. It provides that "[u]pon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action [*i.e.*, public liability action] pending in any State court . . . shall be removed . . . to the United States district court having venue under this subsection." The section also provides for transfer within the federal-court system. The Act does not provide for removal from tribal courts.

B. *The Scope of Public Liability Actions*

1. *Safety Regulation Under the Atomic Energy Act.* This case involves claims of personal injury and wrongful death arising out of a particular activity: petitioners' mining of uranium from the 1950s through the middle 1960s on lands leased from the Navajo Nation. Uranium mining was heavily concentrated in the Four Corners area of the southwestern part of the United States, and much of it took place on the Navajo Reservation. *See* P. Eichstaedt, *If You Poison Us: Uranium and Native Americans* ix, xv, 23-24, 35-36, 89 (1994); *id.* at 2-3 (map of area

showing Reservations and mines). Federal authorities recognized that these mines were concentrated on Indian (including Navajo) lands and that they posed significant potential health hazards. *See id.* at 35, 36, 51.[1]

There is no question that nuclear-related activities have been and are subject to broad federal regulation, including various activities involving uranium, which is a "source material" under the Atomic Energy Act. 42 U.S.C. § 2014(z). In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190 (1983), this Court, while actually rejecting a claim that certain state authority was preempted, nonetheless declared that the Atomic Energy Act gave the Atomic Energy Commission "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials" and that "[u]pon these subjects, no role was left for the States." *Id.* at 207; *see id.* at 205 ("the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant").[2] That sphere of exclusivity, however, has long been subject to an important limitation: based on the statutory language requiring licenses for "source

[1] *See An Interim Report of a Health Study of the Uranium Mines and Mills* by the Federal Security Agency [later the Department of Health, Education, and Welfare], Public Health Service, Division of Occupational Health, and the Colorado State Department of Public Health, May 1952, in *Mine Safety*, Hearings and Report before the House Committee on Education and Labor, 84th Cong., 2d Sess. 305-16, 307 (1956).

[2] The Court later made clear in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), however, that the Commission's "exclusive authority to regulate safety matters" does not extend beyond direct regulation to preempt traditional state-law standards of care applied to impose tort liability, even punitive damages, despite the "regulatory" pressure such standards can exert. *Id.* at 256; *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (describing *Silkwood* as holding that "Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted").

material" only "after removal from its place of deposit in nature" (42 U.S.C. § 2092), uranium *mining* on non-federal lands has apparently long been regarded as outside the purview of the Act. Instead, such mining activities were the subject of the very sort of direct regulation by the States that was precluded for subjects within the preemptive reach of the Atomic Energy Act.[3]

This lack of regulation by the Commission was reflected in a Summary Report, issued by the 1961 Governors' Conference on Health Hazards in Uranium Mines—in which the Commission and other federal agencies participated—which specifically noted that the Commission's "authority is not regarded as extending to control of radiation hazards within uranium mines." *See Radiation Exposure of Uranium Miners*, Hearings before the Subcomm. on Research, Development, and Radiation of the Joint Comm. on Atomic Energy, 90th Cong., 1st Sess. 909 (1967) (reprinting 1961 report). That report also described some efforts to address hazardous conditions in uranium mines by other federal agencies—acting under authority wholly apart from the Atomic Energy Act (*see id.* at 908-09)—and pointed out that "[c]ontrol of these hazards was viewed by the conferees as a primary responsibility of the States" (*id.* at 910). The various federal efforts, undertaken outside the Atomic Energy Act regime, included

[3] *See* Note, *Unfinished Business: The Regulation of Uranium Mining and Milling*, 18 U. Richmond L. Rev. 615, 622-23, 638-40 (1984). This case does not involve federally owned lands subject to 42 U.S.C. § 2097.

Key aspects of the history of the Commission's disclaimer of authority over uranium mines are described in *Begay v. United States*, 591 F. Supp. 991, 1000-02 (D. Az. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985), where the Government relied on that very history to sustain its discretionary-function defense to a Federal Tort Claims Act suit by miners. *See id.* at 1001 ("it was always clear that the state governments regarded the regulation of mine health and safety as state business. Preemptive federal legislation providing for federal regulation of mine health and safety was something that neither the states nor the federal government desired.").

initiatives to address radioactive safety by the Secretary of Labor through rulemaking and by Congress through new legislation in the mid-1960s.[4] Relatedly, Congress enacted new statutes to provide for cleanup of uranium-mill tailings in 1978[5] and to provide compensation to uranium mineworkers in 1990.[6]

2. *Indemnification Under The Price-Anderson Act.* The Price-Anderson Act, enacted in 1957, amended the Atomic Energy Act by adding 42 U.S.C. § 2210, as well as associated definitions in 42 U.S.C. § 2014. Pub. L. No. 85-256, 71 Stat. 576 (1957).[7] From the beginning, the

[4] *See* Federal Metal and Nonmetallic Mine Safety Act of 1966, Pub. L. No. 89-577, 80 Stat. 772, superseded by Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.* For a description of the regulatory actions taken by Secretary of Labor Willard Wirtz, see *Radiation Exposure of Uranium Miners, supra*, at 88-95 (testimony and materials submitted by Wirtz).

[5] The Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021, amended various sections of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and added a new chapter 88 to Title 42, U.S. Code (42 U.S.C. § 7901 *et seq.*). Recognizing the prevalence of uranium-polluted sites on Indian Reservations, the statute provides expressly for coordination with Indian tribes. *See* 42 U.S.C. § 7915; H.R. Rep. 1480, Part I, 95th Cong., 2d Sess. 15, 19, 33, 37, 39 (1978).

[6] Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990), set out at 42 U.S.C. § 2210 note.

[7] To ensure reevaluation in light of developing experience, Congress included a ten-year "expiration" date. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 65 (1978). Congress has "extended the Act's coverage" (*id.* at 66) and amended it several times since 1957, always providing a critical sunset period to ensure congressional reconsideration. Under the currently applicable 1988 Amendments, Pub. L. No. 100-408, 102 Stat. 1066, the relevant expiration date is in 2002 (*see* 42 U.S.C. § 2210(c), (d)). To prepare for the reconsideration, Congress called for Government reports on the Price-Anderson Act by August 1, 1998. 42 U.S.C. § 2210(p). The Nuclear Regulatory Commission has submitted its report: *The Price-Anderson Act—Crossing the Bridge to the Next Century: A Report to Congress* (August 1, 1998) (*"1998 NRC Report"*). That report recommends, among other things, that "Congress should determine whether a public liability lawsuit arising

Act provided for indemnification agreements between the Government (as indemnitor) and certain nuclear licensees (as indemnitees), requiring the agreements in some cases, allowing them in others. *See* U.S. Br. 2-3. For accidents involving activities covered by such indemnification agreements, and only for such accidents, the Act limited the potential liability to be imposed, based on the amounts of the available Government indemnity (originally $500 million) plus required "financial protection" from private insurance. *See* 71 Stat. at 630-631 (original versions of current 42 U.S.C. § 2210(a)-(e)); *Duke Power*, 438 U.S. at 64-65. The Act thus served the dual purposes of "assuring public compensation for nuclear accidents, while at the same time providing the necessary incentives for private development of nuclear-produced energy." *Id.* at 89; *see* 42 U.S.C. § 2012(i) (congressional findings).[8]

This Court took note of the indemnity scheme in *Silkwood*, making clear that "the Price-Anderson Act does not apply"—in particular, neither its provisions limiting liability nor the other substantive provisions of the Act (§ 2210) apply—where (as in *Silkwood*) no indemnification (or associated financial protection) applies to the incident. 464 U.S. at 251 & n.12; *see* U.S. Br. 29 n.16. Where the indemnity and liability-limiting provisions do

or resulting from a nuclear incident may be filed in a tribal court. Further judicial developments relating to this issue may suggest consideration in connection with Price-Anderson renewal legislation." *Id.* at xxi.

[8] *See* S. Rep. 296, 85th Cong., 1st Sess. 8-9 (1957); H.R. Rep. 435, 85th Cong., 1st Sess. 8-9 (1957); S. Rep. 1605, 89th Cong., 2d Sess. 6 (1966); S. Rep. 70, 100th Cong., 1st Sess. 41 (1987); *Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses*, Hearings before the Joint Comm. on Atomic Energy, 89th Cong., 2d Sess. 3 (1966) (*"1966 Hearing"*).

At the same time, Congress acted to enhance the Commission's regulation of nuclear safety to minimize the possibility of liability in the first place. *See* 71 Stat. at 633 (adding original version of 42 U.S.C. § 2039); S. Rep. 85-296, at 9-10; H.R. Rep. 85-435, at 9-10; *see 1966 Hearing* at 9 ("Commission's safety program designed to eliminate need for resort to Price-Anderson").

apply, however, what they cover is defined in terms that have not materially changed since 1957. "Public liability" is defined to mean (with certain exceptions) "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. § 2014(w). "Nuclear incident" is defined as "any occurrence, including an extraordinary nuclear occurrence, . . . causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). And the class of persons liable for public liability is covered by the definition of the phrase "person indemnified," which means a person who has an indemnification agreement or is required to maintain financial protection, as well as "any other person who may be liable for public liability." 42 U.S.C. § 2014(t).[9]

The key "public liability" phrase also underlies the Price-Anderson Act's specific provisions on litigation. In 1966, Congress added a new subsection, 42 U.S.C. § 2210(n), to deal with claims arising out of any nuclear incident serious enough to constitute an "extraordinary nuclear occurrence," as determined by the Atomic Energy Commission, 42 U.S.C. § 2014(j). Pub. L. No. 89-645, 80 Stat. 891, 892. Paragraph (1) provided that indemnity agreements (or the insurance policies providing the initial layer of "financial protection") should contain waivers with respect to various "issue[s] or defense[s]" (timeliness, contributory fault, immunities) that would often arise in actions for liability growing out of such an event. Paragraph (2) then provided that a "public liability action" arising out of an extraordinary nuclear occurrence

[9] As we discuss, and as the Government agrees (U.S. Br. 29 n.16), the category of persons indemnified, which includes *all* persons liable for "public liability," has always been limited to situations involving liability subject to an indemnification agreement. *See* pages 31-33, *infra*. The Government's reference only to indemnity, without separate mention of financial protection, suggests that, in practice, the latter implies the former.

was within the original jurisdiction of the federal courts and, if "pending in any State court," might be removed for consolidation in a single district court (though it need not, *see* S. Rep. 89-1605, at 28). 80 Stat. at 892. Explaining this new jurisdictional provision, the Joint Committee on Atomic Energy specifically pointed out, and relied on, the benefit of coordinating litigation that sought the limited funds provided by the substantive provisions of the Act.[10]

The 1988 Amendments to the Act made several changes in its jurisdictional provisions. Most notably, without altering the definitions of "public liability" or "nuclear incident" in any material way, Congress amended Section 2210(n)(2) to apply to any "nuclear incident."[11] It also added, in the same jurisdictional provision, a requirement that any removal from a State court under the provision must occur within the period provided under 28 U.S.C. § 1446, the general removal-procedure statute. And, finally, seeking to furnish a constitutional basis for the expanded federal-court jurisdiction, Congress added a new definition of "public liability action" (*i.e.*, "any suit asserting public liability") and added a deemer clause, declaring that "[a] public liability action shall be deemed to be an

[10] The Committee noted that "knowledge by one court of what other affected courts were doing would be essential in the orderly distribution of Price-Anderson funds"—that is, funds available under the Act—and pointed to the "related problem . . . of apportioning *insurance and indemnity moneys* in such a way as to reserve sufficient funds for victims whose injuries may not become manifest until long after the nuclear incident." S. Rep. 89-1605, at 8 (emphasis added).

[11] Although the 1979 accident at the nuclear power plant at Three Mile Island for the first time generated substantial litigation involving the Act, and many lawsuits were consolidated in federal court, the Commission ultimately determined that the incident was not an "extraordinary nuclear occurrence" under the Act. The Third Circuit then held that the federal court lacked jurisdiction over claims arising out of the accident. *See Stibitz v. General Public Utilities Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

action arising under section 2210." § 2014(hh). Congress went on to provide, however, that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section." *Id.*[12]

II. Tribal Court Actions

This case involves efforts by petitioners to enjoin the proceedings in two personal-injury lawsuits filed in the tribal courts of the Navajo Nation. The first of these suits was filed in April 1995 by respondents Laura and Arlinda Neztsosie, members of the Navajo Nation, against petitioner El Paso and its affiliate (collectively El Paso), seeking damages for injuries caused by conduct that took place on the Navajo Reservation—indeed, on "land leased from the Navajo Nation" (Pet. 2). J.A. 18a.[13] The complaint states that El Paso operated open-pit uranium mines from approximately 1950 to 1965 in the area of Cameron, Arizona, and that, upon cessation of mining activities, El Paso simply left the mines open and uncovered, where they collected large quantities of water. J.A. 19a. As a result of El Paso's "failure to properly, safely and adequately contain and handle uranium ore and uranium mining waste" (J.A. 20a), the water in the open pits became polluted with radioactive materials and a host of other toxic materials. J.A. 19a, 23a. El Paso failed to warn "of

[12] A relevant House Committee report, while recognizing that this provision for federal-court jurisdiction raised an Article III issue, observed that it was not "designing a new body of substantive law to govern" the cases that Congress was bringing into federal court. The Committee asserted its belief that the expansion of jurisdiction was constitutional and "note[d] that the Congress has used this approach in the Outer Continental Shelf Lands Act [43 U.S.C. §§ 1333(a)(1), 1349(b)(1)]." H.R. Rep. 104, Part 1, 100th Cong., 1st Sess. 18 (1987).

[13] The neurological injuries suffered by respondents are referred to as "Navajo Neuropathy." *See* Snyder *et al.*, *Infantile Onset and Late Central White Matter Lesions in Navajo Neuropathy*, 24 Ann. Neurol. 327 (1988) (abstract).

the potential for leakage and actual leakage of the hazardous radioactive and toxic materials into the air, ground water and soil." J.A. 21a. In the early 1970s, the Neztsosies used the water "for drinking, bathing, swimming, clothes laundering and stock watering." J.A. 19a. The complaint states five claims for relief: negligence; strict liability; outrageous conduct; misrepresentation, fraud, and deceit; and wanton and reckless disregard for health and well being, warranting exemplary damages. While asserting once that El Paso violated tribal laws (J.A. 23a), the complaint follows general practice by setting out the claims without specifying the governing law. J.A. 20a-26a.

The second lawsuit was filed by Zonnie Marie Dandy Richards, on her own behalf and on behalf of her deceased husband (Harold J. Richards, Sr.), likewise members of the Navajo Nation, against a predecessor corporation of petitioner Cyprus (along with other defendants who are not before this Court). J.A. 39a. The amended complaint, filed in January 1996, alleges that Mr. Richards resided from 1953 to 1959 near a uranium mine then operated by Cyprus on the Navajo Reservation—indeed, on Navajo trust land (J.A. 62a)—in Cane Valley, Arizona. J.A. 40a-41a. During that time, and without adequate warnings, Mr. Richards was exposed to water and air contaminated with radioactive and other toxic materials from Cyprus's operations, ultimately causing his death. J.A. 41a-56a.[14] The amended complaint states seven claims for relief: negligence; wrongful death from ultrahazardous activity; loss of consortium from negligence; loss of consortium from ultrahazardous activity; outrageous conduct; misrepresentation, fraud, and deceit; and wanton and reckless disregard for life and health, war-

[14] The amended complaint refers to a mill at the mine site, but Cyprus did not construct its "concentrator" at the site until 1964, after Mr. Richards left the area. Thus, only mining is at issue. The amended complaint also makes similar allegations based on the uranium milling activities that took place at Mexican Hat, Utah, where Mr. and Mrs. Richards lived from 1959 to 1965, but companies other than Cyprus were responsible for those activities.

ranting exemplary damages. J.A. 42a-59a. Like the *Neztsosie* complaint, the *Richards* complaint alleges in passing a violation of tribal laws (J.A. 46a, 54a) but does not specify the jurisdiction whose substantive law supplies the governing standards for the alleged claims.

III. Federal District Court Proceedings

El Paso and Cyprus filed suits in federal district court to stop the tribal-court cases. Both suits contended that there was a federal ouster of tribal-court jurisdiction, not because of anything in general federal Indian law limiting tribal-court jurisdiction, but rather because of the provisions of the Price-Anderson Act. Without pointing to any text in the Price-Anderson Act actually stating that tribal (or other nonfederal) forums lack authority in matters covered by the Act, El Paso and Cyprus rested their contention on two interlinked bases: the asserted exclusive federal *regulatory* role with respect to nuclear safety and the special jurisdictional regime of the Price-Anderson Act. Both companies moved for preliminary injunctions.

The district court in both cases granted part but not all of the requested preliminary injunctions, barring respondents from seeking relief "based upon the Price-Anderson Act in tribal court." J.A. 71a, 73a. That holding necessarily decided that, *if* respondents' claims come within the deemer clause of the Act (§ 2014(hh)), the tribal court has been ousted of jurisdiction to decide them. The district court refused, however, to grant a preliminary injunction against respondents' proceeding in tribal court altogether. That order would have required the district court to determine that respondents' claims actually do come within the deemer clause, and the court, citing the exhaustion doctrine, concluded that it should not decide that issue. It thus made clear that it was not "determin[ing] whether or not the provisions of the Price-Anderson Act have any application to the claims asserted by [respondents] in tribal court." J.A. 71a, 73a.[15]

[15] The Navajo district court in *Richards* had rejected Cyprus's jurisdictional argument, concluding that "[w]hether or not this is a 'nuclear incident' is a factual issue for trial." J.A. 64a. After the federal district court ruled, the Navajo district court in *Neztsosie* denied El Paso's motion to dismiss for lack of jurisdiction.

In partially denying and partially granting "a preliminary injunction" (J.A. 70a-71a, 72a-73a), the district court in both cases ordered the posting of a bond under Fed. R. Civ. P. 65(c), which applies only to a "restraining order or preliminary injunction," not to a final injunction (J.A. 71a, 73a). No final judgment was entered on the docket in either case. J.A. 3a, 5a. El Paso and Cyprus each subsequently filed a "preliminary injunction appeal" (1 Ct. App. Excerpts of Record CR 30 (El Paso); 2 Ct. App. Excerpts of Record CR 11 (Cyprus); *see also* J.A. 3a, 5a (docket sheets)); and in the Ninth Circuit, El Paso and Cyprus, as well as the court of appeals (J.A. 75a), regarded appellate jurisdiction as grounded only in 28 U.S.C. § 1292(a)(1), which covers only "interlocutory" orders. Appellants El Paso Natural Gas Company and Cyprus Companies' Joint Opening Brief at 2, 3. The Neztsosies and Ms. Richards did not take an interlocutory appeal from the preliminary orders precluding them from pursuing their claims in tribal court if those claims come within the deemer clause of the Act.[16]

IV. Court of Appeals Decision

The court of appeals affirmed in part and reversed in part. J.A. 74a-92a. The court held that, even if respondents' claims were deemed to arise under the Price-Anderson Act, the exhaustion doctrine of *National Farmers* and *Iowa Mutual* required petitioners to exhaust, in tribal court, their contention that the Price-Anderson Act ousted the tribal court of jurisdiction over those claims.

[16] Because the injunction against respondents was preliminary, it could be appealed at any time that it became an obstacle to the suits in tribal court: that is, if the tribal court decided that the suits were within the scope of the Price-Anderson Act. Without such a determination, however, the preliminary injunction against respondents was of no immediate effect, and both cases proceeded in tribal court.

J.A. 92a. It thus reversed the district court's preliminary injunctions against respondents, even though respondents had not filed cross-appeals. Having drawn that conclusion, the court then decided that it did not have to address whether respondents' claims in tribal court in fact came within the deemer clause of the Act (if they do not, there is concededly no jurisdictional objection). J.A. 92a. The court thus did not rule on the argument made by petitioners in their appeals seeking to broaden the relief that they had obtained in the district court.

In deciding the issue that it addressed, the Ninth Circuit noted that "[i]n this case, the parties only dispute the applicability of the 'express jurisdictional prohibition' exception" to the exhaustion requirement. J.A. 80a.[17] The court then held, in agreement with the decision of the Tenth Circuit in *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998), that the Price-Anderson Act "does not contain an express jurisdictional prohibition barring the Navajo Tribal Court from determining its jurisdiction over the Navajo Court Plaintiffs' claims." J.A. 82a. The Court explained that the Act, far from expressly prohibiting jurisdiction in tribal (or any other) court, "provides for *concurrent* rather than exclusive jurisdiction over claims arising from nuclear incidents." J.A. 86a. The Act "merely grants defendants the *right*, rather than the obligation, to remove such cases to federal court," and provides that right only with respect to state, not tribal, courts. *Id.* (citing § 2210(n)(2)). The court refused "to 'infer' a jurisdictional prohibition where no 'express' jurisdictional prohibition exists" (J.A. 91a), and it accordingly held that tribal-court proceedings should continue, without front-end interference by a federal court, even if respondents' claims came within the Price-Anderson Act (which the court declined to decide). Judge Kleinfeld dissented. J.A. 93a.

[17] The Ninth Circuit noted that the footnote about exhaustion in *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60 n.14 (1997), had no application to the suits here, which arise out of activities on tribal land. J.A. 87a-88a n.5.

SUMMARY OF ARGUMENT

I. Petitioners seek the most intrusive form of federal-court intervention in tribal-court affairs: a determination that the tribal court lacks jurisdiction over cases pending before it—cases that unquestionably arise out of activities on tribal land—and an injunction to block the tribal court from any further proceedings. This Court has made clear, however, that, with very limited exceptions, "the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" *Iowa Mutual*, 480 U.S. at 15-16 (quoting *National Farmers*, 471 U.S. at 857). To come within the only exception possibly relevant here—that exercise of tribal-court jurisdiction "is patently violative of express jurisdictional prohibitions" (*National Farmers*, 471 U.S. at 856 n.21)—petitioners must establish two propositions: first, that Congress has, through the Price-Anderson Act, expressly prohibited tribal courts from adjudicating "public liability action[s]" and, second, that respondents' claims so patently come within that category that further proceedings in the tribal court would simply be abusive. Absent that two-part showing, the district court was required to stay its hand and allow the tribal-court system a full initial opportunity to judge its own jurisdiction over respondents' cases, with petitioners then free to return to federal court after the tribal-court proceedings are completed.

Petitioners have made neither part of the required showing. With respect to the first issue—the absence of an express jurisdictional prohibition—the Ninth Circuit correctly held that the Price-Anderson Act does not expressly prohibit tribal-court jurisdiction over "public liability" claims. Although petitioners argue (wrongly, we think) that the court of appeals lacked the power to consider that issue, the fact is that petitioners fare no better on the second exhaustion issue, which they appealed and the Ninth Circuit left undecided: respondents' claims are not within the category of "public liability" claims, much less "patently" so. Applying the standards of *National Farm-*

ers and *Iowa Mutual*, the district court thus acted properly in leaving that question for resolution by the tribal courts in the first instance.

II. In resolving the exhaustion issue that all parties agree is properly before this Court, the district court correctly held that, under the applicable exhaustion principles, the tribal courts should first address the question whether respondents' claims are "public liability" claims. The United States, acknowledging that a federal preemption defense is not enough to avoid exhaustion, nevertheless argues against exhaustion here on the ground that the Price-Anderson Act is a "complete preemption regime." That position, however, is infected by a fatal flaw. Even a completely preemptive statutory scheme does not *by itself* authorize federal-court interference with a previously filed action in a nonfederal forum or, for that matter, an initial federal-court determination whether a nonfederal claim is completely preempted. To perform those roles, what is needed is a separate *removal* provision, with the usual stay of proceedings in the nonfederal forum (28 U.S.C. § 1446(d)): a complete preemption provision merely supplies the answer to the questions that the removal statute places before the federal court. But Congress simply has not provided, either in the Price-Anderson Act or in the general federal removal statute, for removal from tribal courts.

The alternative argument made by petitioners—that the claims brought by respondents are so clearly within the deemer clause of the Act that exhaustion would be pointless—is at least focused on the right question, but it is likewise unavailing. To begin with, despite petitioners' insistence on the broad scope of Atomic Energy Act regulation over nuclear-related activities, it does not appear that the Commission has ever exerted regulatory authority over mining activities like those conducted by petitioners, choosing instead to leave those activities regulated at the state level. Moreover, with respect to the Price-Anderson Act, it is utterly implausible to think that Congress in-

tended the phrase "public liability action" to extend to suits, as those here apparently are, in which no defendant is, in the terms of the Act, "liable for public liability" (§ 2014(t)). To apply the deemer clause in the absence of any discernible federal interest—either Atomic Energy Act regulation of the activity at issue or the existence of an applicable indemnity agreement—not only would expand its scope beyond any logical connection to the terms and purposes of the statute of which it is a part, but would raise a serious question of Article III authority and the extent to which Congress intended to test and stretch such authority. Development of the record in the tribal court—far from "serv[ing] no purpose" (*Strate*, 520 U.S. at 460 n.14)—will thus identify the precise conduct at issue and what provisions of the Atomic Energy Act or the Price-Anderson Act, if any, apply to it. The record will then enable full consideration of the statutory issues.

III. These principles dispose of the issues that inarguably are before the Court. But we also believe that the decision of the Ninth Circuit to review the preliminary injunctions against respondents *sua sponte* was within its power. Here, the balance of interests favoring review is as lopsided as possible, indeed entirely one-sided. Most particularly, petitioners were not deprived of the sole interest that is protected by the cross-appeal rule—the interest in finality—because the orders, being interlocutory, are fully subject to appellate review when final judgments are entered. Furthermore, the important congressionally supported interest in granting respect to the authority of tribal courts, taken together with the practical interest in considering intertwined issues together, likewise supports the court of appeals' action. Although the cross-appeal rule is to be applied strictly, neither the experience of the lower courts (where exceptions have been allowed) nor the precedent of this Court demands that it be applied inflexibly, in the face of compelling reasons to the contrary.

IV. On the merits, the Ninth Circuit was right to conclude that the Price-Anderson Act does not contain an express jurisdictional prohibition on tribal courts' adjudica-

tion of "public liability" claims, which are deemed by Section 2014(hh) to arise under the Act. Nothing in the Act deprives any nonfederal forum of its otherwise-available adjudicatory jurisdiction over such claims; rather, the Act makes it quite clear that federal-court jurisdiction is not exclusive. Although the removal provision of the Act does permit defendants to remove cases from state courts—and thus, in effect, ousts the jurisdiction that state courts originally possess—that provision makes no similar mention of tribal courts. This different treatment of tribal courts reasonably reflects the fact that federal-district-court review is available after tribal-court proceedings, whereas state-court cases, if not removed, escape federal-court review except through the process of certiorari to this Court. And, for several reasons, the Act cannot be read as ousting (much less clearly ousting) tribal-court jurisdiction based simply on the nature of the particular claims: tribal courts regularly adjudicate federal-law issues; this Court has expressly rejected any premise of their alleged incompetence to decide complex federal-law issues; and it would be peculiarly inappropriate to oust tribal courts of jurisdiction where, as here, their own common-law standards may well supply the governing law. It is thus proper for the tribal courts to determine, in the first instance, whether they may exercise jurisdiction over the claims asserted before them.

ARGUMENT

I. The Tribal-Court Exhaustion Requirement Bars The Requested Injunctions Against Tribal-Court Proceedings Unless The Tribal Court's Jurisdiction Would Be Patently Violative Of An Express Jurisdictional Prohibition

A. This Court has made clear that tribal-court exhaustion is strictly required, subject to very limited exceptions, in the precise circumstances here: when a federal court is presented with a request by a tribal-court defendant in a pending case to declare the tribal court without jurisdiction and to stop the proceeding. *National Farmers*, 471 U.S. at 853-57. Indeed, the Court has demanded exhaus-

tion even when a tribal-court defendant seeks only to initiate parallel litigation in federal court, without trying to stop the tribal-court proceeding. *Iowa Mutual*, 480 U.S. at 14-19.[18] The Court has stressed two important bases for the exhaustion requirement. First, it serves the comity-based congressional "policy of supporting tribal self-government and self-determination." *National Farmers*, 471 U.S. at 856; *see Iowa Mutual*, 480 U.S. at 14-15. As the Court has observed, "[t]ribal courts play a vital role in tribal self-government . . ., and the Federal Government has consistently encouraged their development." *Id.* at 14-15 (footnote and citations omitted). Second, the requirement serves the traditional policies behind exhaustion requirements generally—allowing the full tribal-court system to consider "its own jurisdiction and to rectify any errors it may have made" and allowing "a full record to be developed" that includes, for the benefit of any later federal-court review, the tribal court's identification of "the precise basis for accepting jurisdiction" and its evaluation of "the factual and legal bases for the challenge" to jurisdiction. *National Farmers*, 471 U.S. at 856-57; *see Iowa Mutual*, 480 U.S. at 15-17.

Emphasizing the importance of this requirement, as a necessary protection against otherwise-routine efforts by defendants to seek federal-court interference with tribal-

[18] Justice Stevens dissented in part in *Iowa Mutual* on the ground that the *Iowa Mutual* case (unlike *National Farmers*) involved an effort to initiate concurrent proceedings rather than an effort to have the federal court stop the nonfederal proceeding. 480 U.S. at 20-22. Justice Stevens noted that, in the state-federal context, the principle limiting a federal-court action brought to stop state proceedings (*see Juidice v. Vail*, 430 U.S. 327 (1977); *see also* Anti-Injunction Act, 28 U.S.C. § 2283; *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970)) is different from and much stronger than the principle of abstention allowing avoidance of concurrent state-federal proceedings (*see Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-16 (1976)). *See* 480 U.S. at 21-22. *See also City of Chicago v. Int'l College of Surgeons*, 118 S. Ct. 523, 534 (1998); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

court jurisdiction, this Court has described the exhaustion rule as an "inflexible bar to consideration of the merits." *Granberry v. Greer*, 481 U.S. 129, 131 n.4 (1987). The Court, accordingly, has recognized only three exceptions to the exhaustion requirement: where an assertion of tribal jurisdiction is made in bad faith or for harassment; where lack of an adequate opportunity to challenge the jurisdiction makes exhaustion futile; and "where the action is patently violative of express jurisdictional prohibitions." *National Farmers*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 19 & n.12. In keeping with the strict nature of these exceptions—amounting to situations in which the tribal courts' exercise of jurisdiction would be a clear abuse of power—the Court has declined to add another exception based on "[t]he alleged incompetence of tribal courts," commenting that any such exception "would be contrary to the congressional policy promoting the development of tribal court." *Id.* at 19. The Court has indicated, however, that federal-court review is available *after* tribal-court exhaustion. *Id.*

This commitment to federal respect for tribal courts is anything but an anachronism. Since *National Farmers* and *Iowa Mutual* were decided, Congress has reasserted its strong policy of promoting development of and respect for tribal courts. In 1993, in the Indian Tribal Justice Act, 25 U.S.C. § 3601 *et seq.*, Congress declared that it had "through statutes, treaties, and the exercise of administrative authorities . . . recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes" (§ 3601(3)) and that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems" (§ 3601(4)). More specifically, it stated that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments" (§ 3601(5)), adding that "Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights" (§ 3601(6)). The congressional committees, fully aware that tribal courts decide federal as well as tribal issues, discussed with approval the decisions in *National Farmers* and *Iowa Mutual*. H.R. Conf. Rep. 383, 103d Cong., 1st Sess. 13 (1993); H.R. Rep. 205, 103d Cong., 1st Sess. 8-9 (1993); S. Rep. 88, 103d Cong., 1st Sess. 8 (1993); *see* Nat'l Mining Ass'n *Amicus* Br. 25 n.21.

This Court's decision in *Strate*, though centrally relied on by petitioners, did not alter the exhaustion requirement in any way. What the Court addressed in *Strate*—and ultimately rejected—was an argument that *National Farmers* and *Iowa Mutual* had actually expanded the *substantive* reach of tribal courts' jurisdiction over the activities of non-Indians on non-Indian fee lands. The Court concluded that those decisions had "enunciate[d] only an exhaustion requirement" (520 U.S. at 453) and had not changed the limits on " 'the inherent sovereign powers of an Indian tribe' " (*id.*) recognized in *Montana v. United States*, 450 U.S. 544 (1981). The Court reemphasized that "the civil authority of Indian tribes and their courts *with respect to non-Indian fee lands* generally 'do[es] not extend to the activities of nonmembers of the tribe.' " *Id.* (emphasis added). As the United States recognizes (U.S. Br. 11-13), therefore, *Strate* says nothing to curtail the jurisdiction of tribal courts in the critically different situation involving activities of non-Indians *on tribal land*.

Having confirmed *Montana*'s restriction on tribal authority over non-Indians on non-Indian fee lands, the Court then noted that this lack of authority obviated the need for tribal-court exhaustion in certain circumstances. In so doing, the Court directly relied on, and did not purport to alter, the three exceptions to exhaustion recognized in *National Farmers* and *Iowa Mutual*. *See* 520 U.S. at 460 n.14 (citing note 21 of *National Farmers* and 520 U.S. at 449 n.7 (discussing exceptions)). The Court simply stated: "*When . . . it is plain* that no federal grant provides for tribal governance of nonmembers' conduct *on land covered by Montana's main rule* [*i.e.*, non-Indian

fee lands], it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from that conduct." *Id.* (emphasis added). In that situation, as in any other situation where it is "plain" that tribal courts lack jurisdiction, to require exhaustion would "serve no purpose other than delay." *Id.* This discussion in *Strate* thus stands for the unremarkable point that the limitations on tribal jurisdiction over non-Indians on non-Indian fee lands—set forth in *Montana* and confirmed in *Strate*—amount, where it is "plain" that they apply, to the sort of express jurisdictional prohibition already acknowledged as an exception to the usual exhaustion requirement.

That situation, of course, is not at all present here. Although petitioners are non-Indian companies, their mining activities took place on *Indian* land, over which the Navajo Nation retained sovereign control, rather than on land owned in fee by non-Indians or comparably alienated land like the state highways in *Strate*. Indeed, petitioners' arguments against exhaustion have never relied on any principle of federal Indian law like that recognized in *Montana*. To the contrary, if only Indian-law principles were at issue, the Navajo court's jurisdiction would be beyond question. This Court in *Montana*, before developing its "main rule" about "land owned in fee by nonmembers of the Tribe," sharply distinguished "land belonging to the Tribe or held by the United States in trust for the Tribe," stating that it "readily agree[d]" that the Tribe had jurisdiction over the latter areas. 450 U.S. at 557. In *Strate*, the Court quoted and reaffirmed that "unqualified recognition" of tribal authority over such tribal land. 520 U.S. at 454 n.8; *see id.* at 454 ("We 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct on tribal land." (footnote omitted)). This case falls under that clear principle.

B. The Navajo Nation's courts are thus entitled to a full opportunity to decide their own jurisdiction over respondents' claims unless petitioners can establish both of the following: that the Price-Anderson Act contains an "express jurisdictional prohibition[]" on tribal-court adjudication of "public liability" claims and that respondents' claims are "patently" among those claims. Any looser standard—based on something less than clear divestiture of tribal-court jurisdiction clearly applicable to the particular case—would improperly demand resolution of the merits at this stage and thus be at odds with the very nature of the exhaustion requirement. Furthermore, it would be contrary to the admonition of this Court that because Indian tribes "retain[] all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Iowa Mutual*, 480 U.S. at 18 (internal quotation marks omitted). This case, in fact, involves a federal-court challenge of the type that is most intrusive on tribal courts: a direct request to stop the tribal-court proceedings, as in *National Farmers*, not merely a request to allow concurrent federal and tribal proceedings, as in *Iowa Mutual*. *See* note 18, *supra*. The interference with tribal sovereignty sought by petitioners is therefore at its greatest, and the comity policies behind exhaustion at their strongest.

The Ninth Circuit decided only whether the Price-Anderson Act expressly bars tribal courts from hearing "public liability" claims, but its power to reach that issue is disputed. Accordingly, we first address the exhaustion question that all parties agree is before the Court (albeit undecided by the Ninth Circuit): whether respondents' claims so patently fall within the Price-Anderson Act that exhaustion is unnecessary. As we discuss below, they do not.

II. Respondents' Claims Do Not Patently Fall Within The Price-Anderson Act, And Exhaustion Would Serve The Purpose Of Developing A Record Necessary To A Proper Determination Of The Act's Applicability To The Tribal-Court Actions

A. Because petitioners' brief seems to suggest otherwise, it is important to emphasize that we are not contending that identical claims for certain nuclear-related injuries

might simultaneously arise under the Price-Anderson Act and yet continue to exist as tribal (or state) claims. It is undisputed that, if respondents' tribal-court claims are "public liability actions," the tribal courts must treat them as such—with whatever consequences for their jurisdiction over such claims that the Act may require (*see* Argument IV, *infra*). Instead, respondents contend that their particular claims in tribal court—because they involve mining activities and incidents not subject to any indemnification agreement—are not properly deemed to arise under the Act at all. To avoid exhaustion, petitioners must go beyond showing the contrary: they must show that the claims are so "patently" within the Price-Anderson Act that exhaustion is pointless. As we discuss below (pages 28-39, *infra*), they cannot do so.

The United States, however, seeks to sidestep the question entirely, contending that its characterization of the Price-Anderson Act as a "complete preemption regime[]" (U.S. Br. 15) means that the federal district court may, and indeed must, directly decide whether respondents' claims are within the scope of the Act.[19] But, to begin with, it is not at all clear what it is about the Price-Anderson Act that would make it into a "complete preemption regime." Unlike the classic "complete preemption" provisions (29 U.S.C. § 1132(a) (ERISA); 29 U.S.C. § 185 (collective bargaining agreements)), the Price-Anderson Act does not displace all of the substantive state-law standards governing conduct in the covered area; to the contrary, as the statute indicates, state-law standards must exist to supply the governing standards under the deemer clause itself. Likewise, under the clear holding of *Silkwood*, the Atomic Energy Act itself does not displace all regulation other than federal regulation, but

[19] The United States then suggests that the issue be left to the lower federal courts, rather than be decided by this Court. But as we discuss below, the error in the United States' theory means that it is not the proper role of the federal courts at all, but rather of the tribal courts, to decide in the first instance whether respondents' claims in fact come within the scope of the Act.

tolerates the indirect regulatory pressure exerted by tort law remedies. *See* note 2, *supra*. Furthermore, unlike the Outer Continental Shelf Lands Act (OCSLA), the statutory analogue cited by Congress (*see* note 12, *supra*; 43 U.S.C. § 1331(a)(1); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479-80 (1981)), no provision of the Price-Anderson Act declares federal regulatory jurisdiction to be exclusive. Finally, the Price-Anderson Act does not expressly create a cause of action: it contains no provision granting particular persons otherwise-absent authority to sue for prescribed relief.[20]

The Court need not resolve these matters, though, because, even if the Price-Anderson Act is thought to be a complete preemption regime, the decisive fact is that this characterization will not do what the United States says it does. As this Court held in *Gulf Offshore*, reviewing the congressionally cited statutory analogue, OCSLA, a provision effecting "complete preemption" of certain state-law claims does *not*, in and of itself, oust nonfederal forums of adjudicatory authority: those very claims can be litigated in the nonfederal forum. 453 U.S. at 477-84; *see also Livadas v. Bradshaw*, 512 U.S. 107, 122 (1994) (state courts may hear claims under completely preemptive 29 U.S.C. § 185). What a "complete preemption" provision does, instead, is to provide a basis for successfully invoking a separate *removal* provision. It is the *removal* provision that authorizes the federal court to decide whether the removed claim is within the sphere of the "complete preemption," and it is the *removal* provision

[20] Indeed, the Congress that first wrote Section 2210(n) specifically said that it was *not* creating a federal cause of action. S. Rep. 89-1605, at 9 (permitting "retention of State law with respect to the cause of action"). What Congress wrote in 1988 is different from a cause-of-action provision: it is a jurisdictional provision and a declaration, for jurisdictional purposes, that certain nonfederal causes of action shall be "deemed to arise" under the Act. The United States carefully avoids ever directly stating that the Price-Anderson Act actually creates a cause of action, making only one indirect reference along those lines in describing decisions of courts of appeals. U.S. Br. 18 n.10.

that, if it is accompanied by a provision like 28 U.S.C. § 1446(d), requires the nonfederal proceeding to stop when the jurisdiction of a federal court is invoked. It is only after a statutory provision for seeking removal is identified and invoked that the notion of complete preemption comes into play, determining whether the case may remain in federal court or must be remanded.[21]

What is lacking here is the requisite removal provision. As the United States necessarily concedes (U.S. Br. 22), the removal provision in Section 2210(n)(2), like the general federal-question removal statute, 28 U.S.C. § 1441, applies only where the original case is in "State court." There is nothing in the Act to indicate that Congress intended that term to cover tribal courts, and petitioners do not contend otherwise. Pet. Br. 23 n.36. Indeed, relying on the fact that Congress has provided definitions to expand the meaning of "state court" for removal purposes when it wished (*e.g.*, 28 U.S.C. § 1451; 48 U.S.C. § 864; *cf.* Sup. Ct. R. 47), the Tenth Circuit has held—with respect to the "federal officer" removal statute, 28 U.S.C. § 1442—that references to "state courts" do not include tribal courts unless so defined by Congress. *Becenti v. Vigil*, 902 F.2d 777 (10th Cir. 1990). The same principle naturally applies to 28 U.S.C. § 1441 and 42 U.S.C. § 2210(n)(2). *Cf.* 42 U.S.C. § 2023(c) (defining "State" for purposes of one section of Atomic Energy Act).

Although the United States (U.S. Br. 25) ultimately asks the Court to fashion a do-it-yourself removal provision, using suits filed under Section 1331 and federal-court injunctive power to force tribal-court plaintiffs to refile in federal court, the request is wholly improper: there is no

[21] Although the United States seeks to distinguish arguments about *complete* preemption from arguments about *ordinary* preemption (U.S. Br. 14-15), the fact is that a claim of either kind of preemption is enough to require a federal court, if its jurisdiction is invoked by a removal petition, to address the question whether it has jurisdiction over the case. The difference lies in the answer to the question: claims of ordinary preemption do not support federal jurisdiction, and the case is thus remanded to state court.

basis for the Court to create a right to removal that Congress itself has chosen not to create. More particularly, it would be inappropriate to assume that Congress, because it provided for removal from state courts, would necessarily have wanted removal from tribal courts as well. For example, after losing *Becenti v. Vigil, supra,* the Department of Justice—in conjunction with its effort to overturn the decision of this Court in *International Primate Protection League v. Administrators of Tulane Education Fund,* 500 U.S. 72 (1991), to allow removal of cases against federal agencies as well as officers—asked Congress to allow removal from tribal courts.[22] But, while Congress did enact the proposal to overturn *Primate Protection League* (Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3850), it did *not* enact the Government's proposal to provide for removal from tribal courts. This refusal to authorize removal is entirely consistent with the fact that, while Congress has considered provisions for removal from tribal court in different contexts,[23] and cases have often been heard in tribal court that would be removable if filed in state court, Congress so far has chosen not to enact any removal statute applicable to tribal courts.

[22] The Congressional Record reports receipt in each House of letters from the Assistant Attorney General, Legislative Affairs, making this two-part proposal. *See* 140 Cong. Rec. S3444 (Mar. 22, 1994) (reporting Executive Communication 2392); **140 Cong. Rec.** H155 (Feb. 1, 1994) (same). The letters explained, and included a section-by-section analysis that likewise explained, that the purpose of the attached bills was to "reverse the adverse effects of the decision of *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990), which prevents suits against federal officers and agencies that are filed in tribal courts from being removed to federal district court."

[23] *See, e.g.*, 139 Cong. Rec. H7012 (Sept. 27, 1993) (proposed version of Catawba Indian Tribe of South Carolina Claims Settlement Act, 25 U.S.C. § 941 *et seq.*) (H.R. 2399, §§ 11.2.2, 12.1.2.2); 139 Cong. Rec. S8096 (June 24, 1993) (S. 1156, §§ 11(b)(2), 12(a)(3)(B)) (same); 141 Cong. Rec. S2831 (1995) (proposed Native American Financial Services Organization Act, S. 436, § 201(d)(3)); 143 Cong. Rec. S5135 (1997) (S. 818, § 101(d)(3)) (same).

Finally, it is important to note that the relief sought by petitioners, and the issues at stake before the federal court, are not the same as those presented upon the filing of a removal petition. In that context, the federal court is asked, first, to decide whether or not *it* has jurisdiction —a question that does not turn on whether the state court (from which removal is sought) had jurisdiction in the first place—and, second, to exercise any jurisdiction that it does have. Here, however, petitioners are not asking the federal court either to decide, or to exercise, its own jurisdiction over the claims but urging it to determine that another court, *i.e.*, the tribal court, lacks jurisdiction over them and then to order that prosecution of the claims be halted. That kind of extraordinary federal interference should rest on no less clear a congressional authorization than is required to invoke the less intrusive, but still carefully limited, procedure for removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (removal provisions are strictly construed); *see also Rivet v. Regions Bank of Louisiana*, 118 S. Ct. 921 (1998).

B. Turning to the proper issue under *National Farmers* and *Iowa Mutual*—whether the claims brought by respondents are clearly within the ambit of the Price-Anderson Act—the short answer is that they are not. Although the scope of the Atomic Energy Act is concededly broad, and although the term "public liability action" in the Price-Anderson Act is broadly defined, it would be utterly anomalous to hold that the deeming provision of the Price-Anderson Act is applicable even where the claims are based on activities relating to the *mining* of uranium and where the relevant incidents were not subject to any indemnification agreement. Indeed, the effect of petitioners' theory is to say that a plaintiff may be deemed to bring a "public liability action" even though none of the defendants is within the class of persons "liable for public liability." 42 U.S.C. § 2014(t). For Congress to create federal jurisdiction over such claims, moreover, would raise

the most serious questions of its power to do so without exceeding the limitations of Article III.

1. Although petitioners speak of "[c]omprehensive federal control over nuclear-related activities" and "the pervasive nature of [Atomic Energy Act] regulation" (Pet. Br. 9, 10), their brief conspicuously omits any discussion about regulation under the Atomic Energy Act of the particular activity at issue in the tribal-court suits: petitioners' *mining* of uranium. That omission is significant: for all of the wide-ranging authority granted by the Atomic Energy Act, the Atomic Energy Commission and its successors (Nuclear Regulatory Commission and Department of Energy) have long disclaimed interest in, and authority to regulate, such uranium mines. Thus, the 1961 report of the federal-state conference convened to review health hazards in uranium mines, discussed at pages 5-6, *supra*, pointed out that the Commission's "authority is not regarded as extending to control of radiation hazards within uranium mines," stating instead that "[c]ontrol of these hazards was viewed by the conferees as a primary responsibility of the States." Quoted in *Radiation Exposure of Uranium Miners, supra*, at 909, 901; *see Begay v. United States*, 591 F. Supp. at 1000-02. In 1967, AEC Commissioner James Ramey reaffirmed in testimony to Congress that "since AEC's authority to regulate source material is limited to material after removal from its place of deposit, mining of uranium is not covered," and he went on to declare that the "AEC from the outset of its procurement activities proceeded on the principle that regulation of mine safety was traditionally a responsibility of the individual States." *Id.* at 159.[24]

[24] Commissioner Ramey pointed out that (contrary to the picture of exclusive federal regulation suggested by petitioners) a number of the western States had in fact adopted and enforced various standards with respect to mining safety. *Id.*; *see id.* at 172-73, 178 (describing various States' standards). *See also Health Impact of Low-Level Radiation, 1979*, Joint Hearing before the Subcomm. on Health and Scientific Research of Senate Committees on Labor and Human Resources and Judiciary, 96th Cong., 1st Sess. 29 (1979)

More recent government testimony confirms that uranium mining like that conducted by petitioners is outside the Nuclear Regulatory Commission's authority.[25]

Given this longstanding hands-off position, it stretches reason to suppose that Congress intended to sweep claims involving wrongful operation and abandonment of uranium mines within the ambit of the Price-Anderson Act. After all, the Price-Anderson Act provisions are part of the Atomic Energy Act, and throughout this litigation petitioners have steadfastly treated the federal interests behind the Price-Anderson Act as inextricably linked to the special regulatory interests behind the Atomic Energy Act. *See* Pet. Br. 9-23. Indeed, the logical linkage is apparent: it is the tight regulation of safety under the Atomic Energy Act that was expected to minimize the possibility of accidents and thus to provide the predicate for the assumption of indemnification liability. *See* note 8, *supra*. Thus, although the Price-Anderson Act speaks of liability arising out of a "nuclear incident," and the definition of "nuclear incident" includes injuries arising out of "source, special nuclear, or byproduct material," it is logical to read that definition, in context, as applicable only to the extent that those materials are subject to the Atomic Energy Act (in which that definition appears). 42 U.S.C. § 2014(q).

(1962 Public Health Service document); Note, *Unfinished Business*, *supra*, at note 3.

25 In 1993, the federal Environmental Protection Agency told Congress that "the NRC has no regulatory authority over uranium mines, except the aboveground activities of solution mines [irrelevant here]." *Clean-Up of Abandoned Uranium Mines & Mine Waste on the Navajo Reservation*, Hearing before Subcomms. on Oversight and Investigations and Native American Affairs, House Comm. on Natural Resources, 103d Cong., 1st Sess. 10 (Nov. 4, 1993). *See also id.* at 33 (testimony of R. Pat Whitfield, U.S. Dep't of Energy) ("Although the Department has authority to remediate uranium mill processing sites on Navajo lands under [the 1978 Uranium Mill Tailings law], it has limited authority to address uranium mines. Only one mine on Navajo lands has fallen under the responsibility of the DOE, through the Uranium Leasing Program, and remediation of this site is already completed").

Petitioners face a comparably daunting problem with the substantive provisions of the Price-Anderson Act itself. Although the Act plainly is intended to be comprehensive as far as it goes, it seems highly implausible to think that, where no indemnification (or financial protection) requirements apply to an accident, Congress nevertheless intended that a claim based on that accident be deemed a "public liability" claim arising under the Act. Most pointedly, a suit "asserting public liability" (*i.e.*, a "public liability action") is naturally construed to have, as defendants, persons that are "liable for public liability." Yet, as the United States acknowledges, the longstanding interpretation of the "person indemnified" definition in the Act makes clear that the class of persons "liable for public liability" *does not include* persons liable for nuclear incidents "in contexts in which *no one* has an indemnification agreement with the government." U.S. Br. 29 n.16.

The relevant provision for these purposes is Section 2014(t) of the Act, which defines the phrase "person indemnified" to include, first of all, "the person with whom an indemnity agreement is executed or who is required to maintain financial protection" and, then, "any other person who may be *liable for public liability*" (emphasis added). This phrase thus encompasses every person liable for public liability, yet, as the United States expressly acknowledges (U.S. Br. 29 n.16), a person is not within the scope of Section 2014(t) *unless* someone responsible for the particular nuclear material is subject to an indemnification agreement. Indeed, the decision of this Court in *Silkwood* makes the same point. In stating that "the Price-Anderson Act [did] not apply" to the facts of that case, the Court in *Silkwood* observed that Section 2014(t), with its inclusive definition of all persons "liable for public liability," was "not relevant." 464 U.S. at 251 & n.12. That provision would obviously be relevant to a suit asserting injury from exposure to nuclear material unless (as was the case in *Silkwood*) the defendants were not liable for "public liability" because no indemnification agreement was applicable to the nuclear material at issue.

This limit on the range of persons "liable for public liability" necessarily contradicts petitioners' insistence that the term "public liability" must apply to *all* liability arising out of a nuclear incident, regardless of whether an indemnification agreement applies. Either the term "public liability" inherently carries the implied limitation to liability arising out of incidents involving some indemnity agreement, or it is proper (and presumably was understood by Congress to be proper) to read a crucial, seemingly unqualified term in the Act as narrowed by context.[26] Either way, however, the narrower view of those persons "liable for public liability" reflects the repeatedly expressed understanding that Congress, rather than extending coverage of the Act to *any* person facing *any* liability for *any* nuclear incident, even in the absence of an indemnity agreement, simply intended to provide an unusual form of "umbrella coverage" to channel liability to a person *having* an indemnification agreement, including liability incurred by a third party (like an airplane pilot who crashes into an indemnified power plant).[27] It should follow, therefore,

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[26] In 1966, AEC Commissioner James Ramey explained to Congress that "public liability" was "a legal term of art." *1966 Hearing* at 3.

[27] *See Report by the Comptroller General*, in *Price-Anderson Act*, Hearing before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology, 97th Cong., 1st Sess. 95, 100-01 (1981); *Reauthorization of the Price-Anderson Act*, Hearing before the Subcomm. on Nuclear Regulation of the Senate Comm. on Environment and Public Works, 99th Cong., 1st Sess. 49 (1986) (*"1986 Hearing"*) (describing "the omnibus insuring provision of the Act, 42 U.S.C. § 2014(t), implemented through the 'Facility Form' insurance policy specified at 10 C.F.R. § 140.91 Appendix A"); H.R. Rep. 100-104, Part 1, at 5 (describing " 'omnibus coverage' " feature of Act); S. Rep. 100-70, at 52 (NRC testimony that Section 2014(t) "made no sense without an indemnity agreement"); *see also* S. Rep. 85-296, at 9-10, 16-19 (citing airplane example and explaining that the licensee's indemnity agreement and private insurance policy will cover "any other person who may be liable for a nuclear incident"); H.R. Rep. 85-435, at 9-10, 16-19 (identical).

that a "public liability action" is similarly limited to suits against persons that are "liable for public liability."[28]

The implied limitation of "public liability" (with its tie to the phrase "nuclear incident") is further reflected in other statements of this Court. For example, the Court said in *Duke Power* that "the Act limited the aggregate liability for a single nuclear incident to $500 million plus the amount of liability insurance available on the private market." 438 U.S. at 64-65. The Court likewise said in *Silkwood*, without qualification, that "the resulting $560 million [of Government indemnity and private insurance] would be the limit of liability for any one nuclear incident." 464 U.S. at 251. But, because "public liability" for a "nuclear incident" is not limited unless there is an indemnity agreement, those statements, to be accurate, must recognize that the terms of the Act are to be read in context as applying only when such an indemnity agreement exists.[29] In the absence of an indemnity agreement, the contractors and licensees are simply not "covered by the Price-Anderson Act." *Report by the Comptroller General, supra*, at 101; 134 Cong. Rec. 19812 (Aug. 2, 1988) (Rep. Udall, sponsor of Amendments, pointing out that

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[28] Congress left Section 2014(t) and its construction in *Silkwood* undisturbed when, with *Silkwood* clearly in mind, Congress revisited the Act in 1988. Importantly, the Three Mile Island incident that led to enactment of the relevant 1988 provisions—and all of petitioners' court-of-appeals authorities—involved accidents covered by indemnification agreements. Congress added a new, partial limit on punitive damages (§ 2210(s)), but it generally "did not intend to change the result the Supreme Court had reached in *Silkwood*." *In re TMI*, 67 F.3d 1119, 1125 (3d Cir. 1995), *cert. denied*, 517 U.S. 1163 (1996) (§ 2210(s) limits only government payment of punitive damages); *see 1998 NRC Report*, at 15-16.

[29] *See also In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 852 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) ("any entity exposed to potential liability for activity resulting in a nuclear incident, even if it were not a direct participant in the activity, was entitled to indemnification"; thus tying "nuclear incident"—a term whose meaning has not changed (*id.* at 837 n.3)—to indemnification).

"the key to Price-Anderson coverage—the authority . . . to enter into indemnification agreements with their licensees and contractors—[had] expired" in 1987 and noting absence of such coverage for many nuclear activities).[30]

Other textual evidence supports this understanding as well. For example, Section 2014(hh) states that certain cases are deemed to "aris[e] under Section 2210." But this language is most naturally read to refer to the *substantive* provisions of Section 2210 (because cases do not "arise under" jurisdictional provisions), and the phrasing would be very peculiar if the Section 2210 substantive provisions were inapplicable to the claim, as they would be in the absence of indemnity (or financial protection).[31] Relatedly, the jurisdictional subsection, 2210(n)(2), seems to contemplate that the "Commission, or the Secretary, as appropriate," can always intervene in a "public liability action" (*see* Pet. Br. 23 n.36), yet that intervention right suggests the presence of indemnification creating the particular federal government interest in the case. Moreover, the inclusion of an "extraordinary nuclear occurrence" in the definition of "nuclear incident" (42 U.S.C. § 2014(q)) suggests a limitation to indemnified conduct: the narrower,

30 *See* Office of General Counsel, U.S. Dep't of Energy, Notice of Inquiry Concerning Preparation of Report to Congress on the Price-Anderson Act, 62 Fed. Reg. 68272, 68274 n.19 (Dec. 31, 1997) (noting that Commission did not provide for "Price-Anderson coverage" except for reactors); *id.* at 68273 n.13 (Department of Energy discretion prior to 1988).

31 The deemer clause serves an important function in cases covered by indemnification agreements. The substantive provisions of Section 2210 typically would involve matters (such as who pays and various defenses) that do not form part of the *plaintiff*'s case and, therefore, without a special statutory provision like the deemer clause, would not ordinarily support "arising under" jurisdiction under the usual test. *See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (under the "well-pleaded complaint" rule "[a] defense that raises a federal question is inadequate to confer federal jurisdiction"); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). The deemer clause solves that problem.

included term expressly contemplates such a limitation, and the distinguishing factor seems to be only the degree of harm, not the applicability of indemnification. *See Gilberg v. Stepan Co.*, 24 F. Supp. 2d 325 (magistrate judge decision), *aff'd*, Letter Order and Opinion (D.N.J. Dec. 14, 1998).[32]

A contrary reading—that the deemer and jurisdictional provisions of the Price-Anderson Act are *not* limited to indemnified activities covered by the substantive provisions of the Act—would also be at odds with basic statutory policy. It is unnatural to think that, when no substantive interest is present, Congress would authorize removal of litigation to federal court (and subsequent consolidation), even for individualized suits like respondents'. Various non-nuclear torts easily could give rise to quite similar appeals for such litigation-management measures, yet Congress has not provided for federal-court jurisdiction over or consolidation of such litigation. Where Congress (and its agency delegates) have not regarded a particular activity as warranting the special industry-encouraging *substantive* treatment provided by the Price-Anderson Act, there is little reason to think that Congress nonetheless contemplated extension of special jurisdictional provisions to that activity. Indeed, both in 1966, when the jurisdic-

32 An "extraordinary nuclear occurrence" is defined to mean "any event causing a discharge or dispersal" of certain nuclear materials or radiation "offsite," which is, in turn, specifically defined to "mean[] away from 'the location' or 'the contract location' as defined in the applicable [NRC] or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210." § 2014(j). As petitioners appear to recognize (Pet. Br. 18 n.22), an indemnity agreement is thus required. It is implausible (even if linguistically possible) that the broader class of nuclear incidents is not likewise so limited. The definition of "extraordinary nuclear occurrence" and the governing regulations (10 C.F.R. §§ 140 .81-.85) both simply presuppose, without calling any attention to, the required indemnity agreement; both indicate that it is only the level and dispersion of damage that distinguishes the special subclass of nuclear accidents as "extraordinary."

tional provision was first enacted, and in 1988, when it was amended to encompass smaller accidents like the (indemnified) Three Mile Island incident, the legislative history relies on the funding provisions to explain the jurisdictional provision. *See* S. Rep. 89-1605, at 8; *1986 Hearing* at 32; S. Rep. 218, 100th Cong., 1st Sess. 13 (1987); H.R. Rep. 100-104, Part 1, at 18. There is no indication that Congress meant to extend coverage to accidents resulting from activities that were altogether outside the substantive scope of the Act.

2. The Article III questions faced by Congress in enacting the jurisdictional provisions of the Price-Anderson Act make it even less likely that it intended to confer federal-court jurisdiction over cases involving neither substantive federal-law issues under the Price-Anderson Act nor substantive federal standards under the Atomic Energy Act. The constitutional difficulties of assigning federal-court jurisdiction over an essentially nonfederal case have been recognized by Congress from the outset. Accordingly, when it first created federal-court jurisdiction over certain claims (arising from an extraordinary nuclear occurrence) in 1966, Congress allayed its constitutional concerns by pointing to the "substantive Federal tort law" created by the waiver-of-issues provision applicable to covered claims (*1966 Hearing* at 37 (AEC General Counsel Hennessy)) and to "the provision made for their satisfaction" by the substantive indemnity and financial-protection provisions of the Price-Anderson Act (*1966 Hearing* at 81 (Professor Cavers)). *See also* note 10, *supra*. From the start, therefore, Congress linked the notion of federal jurisdiction to substantive matters addressed in the Act.

The same link between substance and jurisdiction is suggested by the legislative history leading to the 1988 Amendments. In the key congressional hearing devoted to the jurisdictional amendment, the Committee asked repeatedly about the Article III issue, and in the only apparent substantial response, the basis for the jurisdiction-creating power was, once again, seemingly tied to the substantive provisions of the Price-Anderson Act. *See 1986 Hearing* at 91. Based on the general principle that Congress has "power to draw controversies which may implicate construction or effectuation of its enactment or policies into a federal forum," the testimony pointed to the specific policies of the Price-Anderson Act itself, as applied to the classic indemnified situation of a nuclear power plant: "Congress has chosen in the Price-Anderson Act to exercise its power in the field of claims arising in the context of a *nuclear reactor* accident. In such a context, and without the need to enact substantive rules declaring the standards for recovery, Congress undoubtedly can draw such litigation into federal courts . . . [even though] liability issues, for example, would be governed (by Congressional choice) by state law." *Id.* (emphasis added). There was no discussion of possible federal jurisdiction over cases where, for lack of indemnification, the Price-Anderson Act's substantive provisions did not apply (or of cases where no Atomic Energy Act standards applied).

This evidence of congressional concern about compliance with Article III reflects, and is reinforced by, the familiar principle that a statute should be construed, if possible, to avoid a result that "raises serious constitutional doubt." *Mesa v. California*, 489 U.S. 121, 136-37 (1989). This Court has held that "pure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction." *Id.* at 136 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983)). In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), five Justices recognized that a difficult constitutional question would be raised by an assignment to the federal courts of "jurisdiction over a claim that does not implicate federal law in any way." *Id.* at 441 (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia, Thomas, JJ.); *see id.* at 437-38 (O'Connor, J., concurring in part and concurring in the judgment).

Application of the deemer clause where the substantive Price-Anderson provisions are inapplicable, and even worse where no federal substantive standards apply, would seem to make it nothing more than a "pure jurisdictional statute." *Mesa*, 489 U.S. at 136. Section 2014(hh) uses the language only of jurisdiction, "deem[ing]" certain actions to be actions "arising under section 2210," which itself does not provide a cause of action. Thus, although petitioners vigorously insist otherwise (Pet. Br. 17-18), any cause of action in the Act must be of the disfavored "implied" variety, because nothing in the Act sets forth a "cause of action" at all, *i.e.*, authorizes persons to sue and to recover when they are not already authorized to do so by other sources of law. In any event, it is hardly clear that Congress can avoid the constitutional constraints reflected in *Mesa* by creating a bare cause of action where no substantive federal standards and no other concrete federal interests (*e.g.*, administration of federal lands) are present.[33] Federal jurisdiction in the absence of indemnification or Atomic Energy Act safety standards appears to require just the sort of broad "protective jurisdiction" theory of Article III power that this Court has declined to embrace. *See Mesa*, 489 U.S. at 137.

C. The record of the tribal-court proceedings will provide a substantial basis on which to address these questions. Those proceedings will identify, among other things, what precise conduct of petitioners and what precise materials (perhaps not limited to source materials) caused respondents' injuries; whether the conduct causing harm (*e.g.*, leaving uranium mines exposed to water collection and public access) was within the safety-regulation regime of the Atomic Energy Act at the relevant times; whether

[33] Indeed, this Court "has sometimes found that formally federal causes of action were not properly brought under federal-question jurisdiction because of the overwhelming predominance of state-law issues." *Merrell Dow*, 478 U.S. at 814 n.12, citing and discussing *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900); *see* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 569-70 (1985).

any Atomic Energy Act safety standards in fact addressed the conduct at issue; whether other federal standards addressed the conduct; and whether the conduct was covered by any indemnification agreements under the Price-Anderson Act (*compare* Pet. 10 n.9 *with* Pet. Br. 13 n.12). After the tribal-court proceedings, therefore, the federal court presented with petitioners' contentions will have a fuller, clearer, and more definitive picture of just what respondents' claims are and, as important, what law might be applicable to them. In particular, the federal court will know whether the litigation involves any substantive federal-law issues under the Atomic Energy Act or the Price-Anderson Act.

Those matters are material to a proper analysis of the scope of the Price-Anderson Act. This Court has rejected efforts to construe statutory words, like "public liability" and "nuclear incident," in isolation. To the contrary, both as a matter of regular practice and express doctrine, the Court has repeatedly made clear that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *see Smith v. United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."); *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989).[34] The United States itself, in urging judicial recognition of a *de facto* extension of removal jurisdiction, relies not on any language of the Price-Anderson Act but, rather, on "the structure and purposes of the Act." U.S. Br. 24. The matters to be developed in the tribal court will affect the full consideration and proper resolution of the language, structure, and purposes of the Act.

[34] *See also, e.g., John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 95 (1993); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (" 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy' ") (quoting *United States v. Boisdoré's Heirs*, 7 How. (49 U.S.) 113, 122 (1849)).

III. The Cross-Appeal Rule Is Not An Absolute Bar That Precluded The Court Of Appeals From Reviewing The Preliminary Injunctions Against Respondents

Having discussed at length the issue that the Ninth Circuit did not reach, we nonetheless think that this Court can affirm the judgment below on the basis of the issue that it did reach: the propriety of the (unappealed) orders entered by the district court barring respondents from "seek[ing] relief based upon the Price-Anderson Act in tribal court." J.A. 71a, 73a. Although it was highly unusual for the court of appeals to consider the issue *sua sponte*, this case presented highly unusual circumstances. The balance of interests bearing on the Ninth Circuit's decision to reach the orders against respondents is, for exceptional reasons, completely one-sided.

On one side of the balance, the critical procedural facts are that the orders were *preliminary* injunctions and the appeals by petitioners were interlocutory ones. Respondents therefore were under no obligation to take an interlocutory appeal, which is purely "permissive," but could await eventual entry of final judgments under Fed. R. Civ. P. 58 and pursue their appeals, without loss of rights, at that time. *See* 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3921, at 20 (1996) (citing and quoting many decisions). Accordingly, respondents forfeited nothing and committed no "default" (U.S. Br. 20), and petitioners had no interest whatever in finality or repose based on the orders. The Ninth Circuit's consideration of the district court's bar on any tribal-court proceedings conducted under the Price-Anderson Act was, at worst, premature, for the issue will, if necessary, be presented to the Ninth Circuit on review of the final judgments.

On the other side of the balance, consideration of the issue by the Ninth Circuit enabled the court to minimize intrusions on tribal courts and show the respect for tribal self-government long promoted by Congress. Moreover, the legal analysis in this case demonstrates that the issue

decided by the Ninth Circuit is closely related to the issue that it was asked to decide by petitioners—whether respondents' claims patently come within the Price-Anderson Act. In addition, the ultimate decision that exhaustion was required in any event avoided the more difficult questions, both statutory and constitutional, implicated by petitioners' appeal. For these reasons, all of the policies relevant to the cross-appeal requirement support the court of appeals' decision to reach the issue in this case.

The question, then, is whether the cross-appeal rule is so rigid that it bars consideration of unappealed issues, regardless of the circumstances. We think that it is not. In the first place, the experience of the lower courts, where narrow exceptions have been recognized over the years, supports treatment of the rule as strict but not absolutely rigid.[35] These precedents reflect practical judicial judgments supporting narrow exceptions to, or modest flexibility in, the cross-appeal rule. *See* 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3904 (1992). Equally important, the very existence of these authorities shows that the cross-appeal rule can be less than utterly rigid without opening the floodgates

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[35] *See, e.g., Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341 (9th Cir. 1981) (joined by Kennedy, J.) ("a protective or cross-appeal is only the 'proper procedure,' not a jurisdictional prerequisite once an initial appeal has been filed"); *Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co.*, 987 F.2d 594, 596 (9th Cir. 1993) (reaffirming *Bryant* ruling); *Freeman v. B&B Associates*, 790 F.2d 145, 151 (D.C. Cir. 1986); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir. 1990) (R.B. Ginsburg, J.), *cert. denied*, 498 U.S. 980 (1990); *Champagne v. Schlesinger*, 506 F.2d 979, 982 (7th Cir. 1974) (joined by Stevens, J.); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 668 (5th Cir. 1983); *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-45 (3d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *United States v. Bohn*, 959 F.2d 389, 392-94 (2d Cir. 1992) (allowing Government to increase an unappealed part of a criminal sentence where an appealed part was reduced on appeal).

and defeating its important role in narrowing issues in litigation.[36]

The precedent of this Court, likewise, does not demand unyielding application of the cross-appeal rule. The principal authorities cited by petitioners and the Government, *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994), and *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), do not say that the rule is absolute or "jurisdictional," although in *Morley* the petitioner so characterized the point (*see* 81 L. Ed. at 594) and the Court found lack of "power" to reach an issue in the circumstances presented (300 U.S. at 187). Moreover, this Court specifically concluded otherwise in *Langnes v. Green*, 282 U.S. 531 (1931), which was cited with evident approval in *Morley* itself (300 U.S. at 191), and which has continued to be relied on (*see United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) (cited in *Northwest Airlines*)). The Court in *Langnes*, after pointing to various decisions recognizing broad appellate authority over the lower court judgment once one party seeks review (282 U.S. at 535-37), characterized the decisions applying the cross-appeal rule as resting only "upon the theory that the court is not *bound* to consider objections to the decree urged by respondent, in the absence of cross-petition for certiorari" (*id.* at 537). The Court then explained that the cross-appeal decisions "simply announce a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although

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[36] The rule is thus much like the strict rule of this Court that petitioners cannot raise a question that is outside the questions presented (Sup. Ct. R. 14.1(a)), which serves its important purposes even though it is not treated "as a jurisdictional bar" (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981)) and the Court occasionally makes exceptions (*see* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 6.25(g), at 340-41 (7th ed. 1993)).

he has not applied for certiorari, if the court deems there is good reason to do so." 282 U.S. at 538.[37]

The decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988)—whose result has since been overturned by amendment (*see* 1993 Advisory Committee Note, Fed. R. App. P. 3)—does not demand a contrary conclusion. In treating as "jurisdictional" (487 U.S. at 317, 318) the requirement of Fed. R. App. P. 3 that a notice of appeal "shall specify the party or parties taking the appeal," the Court reasoned that the mandatory nature of the time limits for appeal (*see* Fed. R. App. P. 4; 28 U.S.C. § 2107) would otherwise be vitiated (487 U.S. at 315). Even so, the Court found a particular notice of appeal—from the "final" judgment at issue in *Torres* (487 U.S. at 313)—to be insufficient only after concluding that the notice failed to provide "the functional equivalent of what the rule requires," considering the "purpose of the specificity requirement." 487 U.S. at 317, 318.

In the present case, petitioners have not identified any statute or formally promulgated rule whose terms the decision of the Ninth Circuit would flout. The core rationale of *Torres*, moreover, has no application here: the interest in finality and repose that was protected by the strict application of Rule 3 in *Torres* is wholly missing in this case.[38] The decision in *Torres* itself indicates that,

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[37] *See also Bowen v. United States Postal Service*, 459 U.S. 212, 217-18 n.7 (1983) (plaintiff-appellee was not required to take a cross-appeal in order to have appeals court increase the district-court judgment against the defendant-employer after reduction of the judgment against the appellant, defendant-union); *id.* at 244-45 (White, J., joined by Marshall, Blackmun, JJ., dissenting in part).

[38] That is because, as noted, the appellate process at issue here was interlocutory. In addition, Mr. Torres, by failing to be an appellant (and not otherwise participating in the court of appeals), may not have been a party in the court of appeals at all. There is no Rule of Appellate Procedure treating all nonappellants as appellees. *Compare* Sup. Ct. R. 12.6 (treating as respondents any non-petitioning parties below, but also stating that "[p]arties who

even where a "rule" is treated as "jurisdictional," its proper application is linked to the purposes behind it. Because no textual violation is at issue here, and the function of the cross-appeal rule is not advanced by invoking it to bar relief, the strict reading of Rule 3 in *Torres* does not stand in the way of recognizing the otherwise-sensible exception for the limited circumstances presented here.

IV. The Price-Anderson Act Does Not Expressly Prohibit Tribal-Court Jurisdiction To Adjudicate Public Liability Claims

A. The Ninth Circuit, in reviewing the order barring respondents from pursuing claims "based upon the Price-Anderson Act in tribal court" (J.A. 71a, 73a), correctly decided that the Act did not contain a patent jurisdictional prohibition against tribal-court adjudication of such claims. *See National Farmers*, 471 U.S. at 856 n.21; *Iowa Mutual*, 480 U.S. at 19 n.12. El Paso itself acknowledged in the district court "the absence of a clear cut jurisdictional mandate within the statute" (Reply In Support Of Application for Preliminary Injunction, 1 Ct. App. Excerpts of Record CR 12 at 5), and the Government has effectively acknowledged the same thing in recommending that Congress, in reconsidering the Price-Anderson Act, now decide the issue (*see* note 7, *supra*). In fact, it is plain on the face of the statute that neither the deeming provision (§ 2014(hh)) nor the jurisdictional provision (§ 2210(n)(2)) constitutes an express prohibition of jurisdiction in tribal courts.

The normal rule, of course, is that federal claims are not within the exclusive jurisdiction of the federal courts. *See Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990). The deeming provision deems certain claims to arise under Section 2210, but it does not state that tribal courts, or

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file no document will not qualify for any relief from this Court"). Respondents here, by contrast, were parties in the Ninth Circuit—they were the appellees who were directly adverse to the appealing petitioners—regardless of whether they filed an appeal.

any other courts, lack jurisdiction over them. Furthermore, Section 2210 makes plain that federal jurisdiction is not exclusive: cases covered by the Act may be filed and remain in state court, subject only to the opportunity for removal. S. Rep. 89-1605, at 28 (removal is permissive). This lack of exclusivity is not unusual: this Court has expressly held that, under the OCSLA (which a congressional committee invoked as a precedent for the 1988 provisions), federal courts do not have exclusive adjudicatory authority over claims under that Act despite exclusive federal regulatory authority in the area. *Gulf Offshore*, 453 U.S. at 477-84. And, as the United States explains (U.S. Br. 12-13), where there is no issue of lack of territorial jurisdiction over non-Indian fee lands, as in *Strate*, a defendant cannot strip the tribal courts of adjudicatory authority over its conduct on Indian land merely by asserting, as a defense, that federal law preempts regulatory authority over the conduct.

A removal provision applicable to tribal courts presumably would, if accompanied by a provision like 28 U.S.C. § 1446(d) (directing state proceedings to cease upon filing of a removal petition), constitute a patent jurisdictional bar to the exercise of tribal-court jurisdiction (until any remand from a federal court). But that theory cannot help petitioners, who never sought removal and who, indeed, appear to agree (Pet. Br. 23 n.36) that the Act does not authorize removal from tribal courts. As noted at page 27, *supra*, that silence reflects Congress's general practice of *not* providing for removal from tribal courts.

Nor can the lack of a removal provision be turned upside down to imply that Congress meant to deprive tribal courts of jurisdiction in the first place. Even outside the tribal-court context, the conclusion does not follow from the premise. Notwithstanding a strong interest in access to a federal forum, Congress may reasonably decide to leave particular cases for resolution in state or tribal courts. In *International Primate Protection League*,

for example, this Court determined that Congress had not provided for the removal of suits against federal agencies, without any suggestion that, as a result, state courts should be treated as having been deprived of jurisdiction over such actions. In the tribal context, a mere implied deprivation of otherwise-available authority is particularly inappropriate. *See, e.g., Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985); *Merrion v. Jicarilla Apache Tribes,* 455 U.S. 130, 152 (1982); *cf. White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980) ("Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.").

The absence of a right of removal might indicate an intent to deny jurisdiction if no rational basis for having jurisdiction without removal could be imagined. But that is not the case here. The choice reflected in the Act—providing for removal from State courts but not tribal courts—is one that, for several reasons, "Congress could rationally have made." *International Primate Protection League,* 500 U.S. at 85. Most obviously, as we have discussed, Congress has a special, recently reaffirmed policy of encouraging development of tribal courts. Furthermore, removal is not necessary to obtain federal-court consideration of the very federal question at issue here, namely, the jurisdiction of the tribal court, which, under *National Farmers,* will be reviewed following the tribal-court proceedings if petitioners wish.[39] In contrast, federal questions in a civil state-court case, as a practical matter, typically escape any federal-court review in the absence of removal, because the only means of review is certiorari in this Court. Finally, in the Price-Anderson Act in particular, Congress could have considered the limited nature

[39] It is an open question whether other federal-law issues in a tribal court may be reviewed in federal court after completion of tribal-court proceedings. *See* Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions,* 46 U. Kan. L. Rev. 241 (1998).

of nuclear activities on Indian lands or Reservations (most of which are in the nature of mining) and rationally concluded, as a practical matter, that any resulting "public liability" actions within tribal courts' jurisdiction were simply unlikely to be of the Three Mile Island sort contemplated by the removal and consolidation provisions of Section 2210(n).

B. Nothing about the nature of claims deemed to arise under the Price-Anderson Act creates an ouster of jurisdiction in the tribal courts, let alone an express ouster. The courts of the Navajo Nation adjudicate federal-law claims,[40] as do other tribal courts.[41] This Court recognized as much when it left adjudication under the Indian Civil Rights Act, 25 U.S.C. § 1302, to tribal courts in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65-66 (1978). The Court, moreover, has rejected any theory of incompetence of tribal courts to decide complex federal-law questions. In *National Farmers,* the Court expressly stated that the jurisdictional inquiry depended on just such a complex federal-law inquiry, yet held that it is precisely that inquiry which should, in the first instance, be undertaken by the tribal court. 471 U.S. at 856. And, in *Iowa Mutual,* the Court reiterated that "[t]he alleged incompetence of tribal courts is not among the exceptions to the

[40] The Navajo courts have jurisdiction under Navajo law to decide issues of federal law (7 Navajo Tribal Code § 204(a)) and have done so, including preemption claims, when the occasion has arisen. *E.g., Pela v. Peabody Coal Co.,* N.L.R. Supp. 156 (Nav. Sup. Ct. 1990); *Estate of Jumbo,* N.L.R. Supp. 112 (Nav. Sup. Ct. 1990); *Arizona Public Serv. Co. v. Office of Navajo Labor Relations,* N.L.R. Supp. 162, 171-72 (Nav. Sup. Ct. 1990).

[41] *E.g., Crow Tribe of Indians v. Santala,* 21 I.L.R. 6096 (Crow Tribal Ct. 1994); *Hopi Tribe v. Manycow,* 21 I.L.R. 6080 (Hopi Tr. Ct. 1994); *Colville Confederated Tribes v. Stock West, Inc.,* 21 I.L.R. 6075 (Colv. Tr. Ct. 1994); *Coeur D'Alene Tribe v. AT&T Corp.,* 23 I.L.R. 6060 (Coeur D'Alene Tr. Ct. 1996); *Estate of Tasunke Witko (Crazy Horse) v. G. Heileman Brewing Co.,* 23 I.L.R. 6104 (Rosebud Sioux Sup. Ct. 1996). *See also United States v. Plainbull,* 957 F.2d 724 (9th Cir. 1992) (requiring exhaustion of trespass claims under 25 U.S.C. § 179).

exhaustion requirement . . . and would be contrary to the congressional policy promoting the development of tribal courts." 480 U.S. at 19 (footnote omitted).

More pointedly, this Court has explained (in the highly pertinent OCSLA context) that it is particularly inappropriate to conclude that Congress had deprived state courts of jurisdiction to hear federal-law claims where the claims involved are "claims whose governing rules are borrowed from state law." *Gulf Offshore*, 453 U.S. at 484. Here, even if respondents' claims come under the deemer clause, the tribal courts would, under that clause, presumptively apply traditional common-law standards, and federal regulatory standards may never even enter the cases. Moreover, the governing common law may well be that of the Navajo Nation. The reference to "law of the State" in the deemer clause has been construed to invoke the whole law of the State, including choice-of-law principles (*see In re Hanford Nuclear Reservation Litigation*, 780 F. Supp. 1551 (E.D. Wash. 1991)), in keeping with the longstanding interpretation of the comparable provision of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). *See Richards v. United States*, 369 U.S. 1, 11 (1962). The state choice-of-law principles may lead to the choice of tribal law, perhaps under compulsion of federal-Indian-law principles, to govern torts committed against Indians on Tribe-owned land within the Reservation.[42] Alternatively, the choice-of-law issue may never have to be decided because common-law standards of the State and of the relevant Tribe may effectively be the same.

There is, therefore, no reason to depart from the doctrine of exhaustion established in *National Farmers* and

[42] *See also Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157 & n.12 (1982) (federal law is "part of the law of every State"; construing "'law of the jurisdiction' in which the property is located" as incorporating federal law, because "the 'law of the jurisdiction' includes federal as well as state law").

Iowa Mutual. Nothing in the Price-Anderson Act constitutes an express jurisdictional bar to tribal-court consideration of claims deemed to arise under the Act. If Congress wants tribal-court defendants to be able to redirect suits against them to federal court, then it should enact a removal provision. Until that time, however, the tribal courts should be permitted in the first instance to exercise (and resolve any question about) their jurisdiction without interference from the federal courts.

CONCLUSION

The judgment of the court of appeals should be affirmed. If this Court concludes that the court of appeals was without jurisdiction to reverse the orders against respondents, then it should affirm that part of the judgment affirming the orders against petitioners.

Respectfully submitted,

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